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Supreme Court of the United States

OCTOBER TERM, 1956.

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VINCENT CICENIA,
Petitioner-Appellant,

vs.

R. WILLIAM LAGAY, Superintendent of New Jersey State Prison Farm at Rahway, New Jersey,
Respondent-Appellee.

BRIEF OF RESPONDENT STATE OF NEW JERSEY OPPOSING PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT STATE OF NEW JERSEY OPPOSING PETITION FOR WRIT OF CERTIORARI.

I.

Reference to Official Reports of Opinions Delivered in the Courts Below.

The opinion of the United States Circuit Court of Appeals, Third Circuit, the Court immediately below and here under review is not officially reported. (See petitioner's Appendix, Exhibit B, page 30.)

The opinion of the United States District Court, District of New Jersey (Hon. Phillip Forman) is also not officially reported. (See petitioner's Appendix, Exhibit A, page 23.)

The opinion of the Supreme Court of New Jersey holding that petitioner did not have an absolute right to a pretrial inspection of his confession is officially reported in 6 N. J. 296, 78 A. 2d 568, which modified the holding of the New Jersey Superior Court, Appellate Division, reported in 9 N. J. Super. 135, 75 A. 2d 476.

II.

Counter-statement Concerning Jurisdiction.

Petitioner states in his petition, without elaboration, that the jurisdiction of this Court is being invoked under 28 U. S. C., sec. 1254(1) (petition, p. 1).

We respectfully submit that the judgment of the Court of Appeals, the court immediately below, as well as the judgments of the courts of New Jersey involving the constitutional questions herein presented, are in strict conformity with the provisions of the Federal Constitution respecting due process and equal protection of the laws as guaranteed by the United States Constitution(1), and that the Court below did not decide any constitutional question of substance in a manner contrary to the decisions of this Court.

We, therefore, respectfully submit that this Court should not entertain jurisdiction but should deny issuance of a writ of certiorari.

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(1) Constitution of the United States, Amendment XIV, Section 1.

III.

Counter-statement of the Case.

Vincent Cicenia, the petitioner herein, is applying to this Court for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals, Third Circuit, entered January 7, 1957, which affirmed the judgment of the United States District Court, District of New Jersey, denying petitioner's application for a writ of habeas corpus, entered July 17, 1956.

Following is a brief summary of the antecedent events and proceedings in the case.

On March 17, 1947, at about 8:30 P. M., at Newark, one Charles Kittuah was shot and killed in his small dry-goods store during the perpetration of an armed robbery. There were no eye-witnesses to the killing; the perpetrators escaped immediately after the crime; and the crime remained unsolved until December 1949. Solution of the crime came about in this manner.

The petitioner Vincent Cicenia, and two others, Armando Corvino and John DeMasi, were residents of the City of Orange, a suburb of Newark. As a result of information furnished the Orange Police by Corvino's wife, Corvino and DeMasi were taken into custody and questioned by the Newark police. Corvino and DeMasi immediately admitted their participation in the crime, and they implicated this petitioner Cicenia.

On the morning of December 18, 1949, in response to a call from the Orange police, petitioner went to Orange

police headquarters where he was immediately taken into custody and turned over to the Newark police for questioning and investigation.

On the afternoon of the same day, while the investigation by the Newark police was in progress, at about 2:00 P. M., Mr. Frank A Palmieri, an attorney, appeared at Newark police headquarters and requested to see the petitioner, stating he had been retained by petitioner's family to represent him.

The attorney was informed that the police and State prosecuting officials were then engaged in questioning the petitioner as well as the other two, Corvino and DeMasi, and that as soon as the investigation was completed the attorney would be permitted to see and consult with his client.

The investigation was concluded at about 9:00 P. M. and the above-named attorney was immediately permitted to consult with his client, the above-named petitioner.

The following morning, December 19, at about 11:00 A. M., all three of the accused, including this petitioner, were properly arraigned in the Magistrate's Court where they were formally charged with the crime of murder. At the arraignment, petitioner was represented by the above-named attorney; all three defendants were properly advised of their rights pursuant to the pertinent New Jersey Rules of practice and procedure; and they were remanded to the county jail without bail to await action by the Grand Jury.

The Essex County Grand Jury (1949 term) returned an indictment against the three defendants charging that

they "did wilfully, feloniously and of their malice aforethought kill and murder Charles Kittuah," etc.

Before trial of the indictment, on March 3, 1950, counsel for petitioner, said Mr. Palmieri, presented a motion before the county judge, the late Hon. Joseph E. Conlon, requesting a pre-trial inspection and suppression of petitioner's written confession upon the ground the petitioner's attorney had been denied permission to see and consult with his client during the police questioning and investigation of the crime on the afternoon of December 18, as hereinbefore referred to. Petitioner's motion for a pre-trial inspection and suppression of his written confession was denied by the trial judge.

Petitioner's appeal from the trial judge's denial of the above motion was dismissed by the New Jersey Superior Court, Appellate Division. (See *State* v. *Cicenia*, 9 N. J. Super. 135, 75 A. 2d 476).

On appeal to the New Jersey Supreme Court, the judgment of the Appellate Division was affirmed with modification, and it was held that a defendant does not have the absolute right to a pre-trial inspection of his written confession or those of his co-defendants. (See *State* v. *Cicenia*, 6 N. J. 296, 78 A. 2d 568.)

On March 26, 1951, the date fixed for trial of the indictment, all three defendants, represented by their individual counsel, offered their pleas of non vult to the indictment. The pleas were consented to by the prosecuting attorney and accepted by the court.

On April 18, 1951, the three defendants, also represented by their individual counsel, were sentenced to life

imprisonment. (The proceedings at the time of the pleas and at the time of sentence were submitted and received by the United States District Court by stipulation between counsel on both sides at the hearing on application for a writ of habeas corpus.)

In December, 1953, while petitioner and his co-defendants were serving their sentence, petitioner filed a petition in the Essex County Court for a writ of habeas corpus wherein he claimed that: (a) his arrest was an unlawful one; (b) there was an unreasonable delay in his arraignment; and (c) *he had been denied counsel* between the time of his arrest and arraignment (which was one of his grounds in his habeas corpus proceedings in the United States District Court and again in his appeal before the Court below).

The Essex County Court granted to petitioner a writ of habeas corpus and petitioner was granted a plenary hearing in that court on January 21, 1955. At the conclusion of the hearing the court discharged the writ, holding that petitioner's claims were without merit. (These proceedings were likewise submitted to the United States District Court by stipulation at the hearing on the habeas corpus proceedings.)

On appeal, the Superior Court of New Jersey, Appellate Division, affirmed the County Court's dismissal of the writ of habeas corpus. The affirmance was dated July 11, 1955, but was not officially reported. (The court's opinion was also submitted by stipulation to the United States District at the hearing in that court.)

Petitioner thereafter moved before the Supreme Court of New Jersey for leave to appeal from the judgment of the Appellate Division as an indigent, and his motion was denied on September 12, 1955. (Also submitted as part of the record before the United States District Court.)

Petitioner thereafter applied to this Court for a writ of certiorari to review the New Jersey Supreme Court's denial, and this Court denied certiorari on December 12, 1955. (See *Vincent Cicenia* vs. *State of New Jersey*, 350 U. S. 925, 76 S. Ct. 215.)

Petitioner thereafter sought redress in the Federal courts by applying to the District Court for a writ of habeas corpus substantially upon the same grounds he had advanced in the State courts; namely, that his arrest and detention for slightly in excess of 24 hours, during a portion of which he was subjected to police questioning, was unlawful; that during the course of the police questioning he gave an involuntary written confession which his counsel was prohibited from inspecting before trial; and that these circumstances allegedly constituted a denial of due process of law.

In his Brief petitioner discusses several points which we shall argue in the order presented.

IV.

Summary of the Argument.

We respectfully submit:

One. Petitioner's confession was not extorted nor obtained by means of fundamental unfairness, but it was given voluntarily; since petitioner entered a plea of non vult to the indictment the confession was not used against him at any stage of the proceedings; and the plea of non vult was given voluntarily and understandingly in the presence of and upon the advice and consent of his attorney.

Two. In conformity with New Jersey law that an accused is entitled to the aid and assistance of counsel for his defense at the trial, petitioner was not denied any constitutional right to counsel while he was being questioned during the police investigation of the crime, especially where petitioner was afforded counsel immediately upon completion of the police investigation and from thenceforth throughout every step of the criminal proceedings.

Three. The refusal of the State courts to permit petitioner's attorney to inspect the confession before trial was in accordance with New Jersey law, and such refusal cannot be said to have contributed to any alleged "unfairness" in the proceedings.

V.

ARGUMENT.

POINT ONE.

Petitioner's confession was not extorted nor obtained by means of fundamental unfairness, but it was given voluntarily; since petitioner entered a plea of non vult to the indictment the confession was not used against him at any stage of the proceedings; and the plea of non vult was given voluntarily and understandingly in the presence of and upon the advice and consent of his attorney.

The gist of petitioner's argument under his Point I seems to be, in brief, that his confession was an involuntary one and had been extorted from him by the police; that the confession was taken from him during the time his attorney was refused permission to see and consult with him; and that the existence of his confession induced him to enter his plea of non vult.

With this we cannot agree.

It is the State's contention, briefly, that:

(a) Petitioner's confession was not extorted from him, as he claims, but it was given voluntarily in accordance with the requirements of New Jersey Law and in strict compliance with "fundamental fairness essential to the very concept of justice."

(b) Petitioner's attorney was not permitted to consult with petitioner during the taking of the confession because, under New Jersey law, an accused is entitled to the aid and assistance of counsel *at the trial* and not while the police are investigating the crime during the period between the accused's arrest and arraignment. In the instant case, petitioner was taken into police custody on the morning of December 18; his counsel was permitted to see and consult with him immediately upon the completion of the police investigation on the evening of the same day; petitioner was represented by counsel of his own choosing the following morning upon his arraignment before the Magistrate; and thereafter he was represented by counsel throughout the entire criminal proceedings until the imposition of sentence.

(c) Petitioner's confession was never used against him at any stage of the proceedings, because he entered a plea of non vult to the indictment in the presence of his counsel and upon the advice and consent of his counsel, and the plea was offered voluntarily and understandingly. (It is to be noted that the confession was taken on December 18, 1949, and the plea was offered on March 26, 1951, after a lapse of 15 months.)

(d) The refusal of the State courts to allow to petitioner a pre-trial inspection of his confession was in conformity with the established law of New Jersey, and it cannot be considered as any important factor in the totality of circumstances claimed by petitioner to have resulted in any denial of due process of law.

(a)

Petitioner's confession was given voluntarily, and in accordance with "fundamental fairness essential to the very concept of justice."

At the hearing in the District Court, in the habeas corpus proceeding, petitioner testified that on December 18, 1949, after he was turned over to the Newark police by the Orange police, he was questioned in Newark police headquarters; that he was removed back and forth several times between his detention cell and the interrogation room; that he was given nothing to eat; that during the course of the questioning "they were hitting me and they started beating me;" that "if I didn't agree to sign a statement that was being prepared by Detective George Meagher that I would never be able to go home again or see my parents or consult or be able to call or see my lawyer," (T-20)(2); that "They slapped me around and hit me in my back, side and rib section," (T-24); and that he signed the confession "against my will," (T-26).

The State specifically and directly contradicted each and every statement of petitioner with regard to his alleged police mistreatment.

Detective-Lieutenant Joseph A. Kinney of the Newark Homicide Squad testified that petitioner was given food "around 1 o'clock," (T-63); and that petitioner had not been subjected to any abuse or threats or physical violence, (T-64, 69).

Prosecutor's Detective George E. Meagher, a member of the prosecutor's staff for more than 27 years, testified

(2) References are to the testimony in the Transcript of the proceedings before Hon. Phillip Forman, Judge of the U. S. District Court.

that petitioner first gave him a detailed oral account of the crime and the part played by each of the three participants, (T-75 to 78); that there were no threats or violence shown the petitioner nor any promise of reward made to him, (T-80); that the petitioner gave the information and Detective Meagher prepared in handwriting the 7-page confession, and it took from 5:17 P. M. to about 8:10 P. M. to write the confession; that thereafter Detective Meagher read the confession aloud to petitioner and petitioner himself read it aloud; that petitioner signed each and every one of the seven pages of the confession; that thereafter a disinterested citizen-witness named Taylor questioned the petitioner in regard to police treatment and petitioner acknowledged that he had been treated properly (T-80 to 87).

Assistant Prosecutor Maurice J. McKeown and Detective Carlton B. Norris, who were present during the questioning, also testified to every detail in connection with the taking of the confession and they verified that the confession was given voluntarily and in conformity with every standard of fairness.

It is established in New Jersey that before a confession may be admitted in evidence it must be proven to have been given freely and voluntarily and not induced by fear or hope or other considerations leading to the substitution of something else than the truth. (*State* v. *Rios*, 17 N. J. 572, 599-601, S. C. 1955; *State* v. *Walker*, 15 N. J. 485, S. C. 1954; *State V. Grillo*, 11 N. J. 173 S. C. 1952; *State* v. *Cole*, 136 N. J. L. 606, E. & A. 1948).

In the instant case, the confession was taken not only in accord with the New Jersey rule of admissibility on the

basis of voluntariness, but the methods used were in strict conformity with the constitutional requirements of "fundamental fairness essential to the very concept of justice," under the Fourteenth Amendment to the Federal Constitution. (Cf. *Watts* v. *Indiana*, 338 U. S. 49, 93 L. Ed. 1801, 1949; *Harris* v. *South Carolina*, 338 U. S. 68, 93 L. Ed. 1440, 1949; *Turner* v. *Pennsylvania*, 338 U. S. 62, 93 L. Ed. 1810, 1949).

Here there was none of the continuous, prolonged questioning and grilling by relays of officers under conditions and circumstances determined by this Court in the *Watts*, *Harris* and *Turner* cases, *supra*, to be improper and oppressive and making the resulting confessions in those cases inadmissible and violative of the rule of "fundamental fairness."

The only police officials and officers who undertook the investigation and questioning of not only this petitioner but of his two confederates were an assistant prosecutor (McKeown), a prosecutor's detective (Meagher) and two detective-members of the local homicide squad (Kinney and Norris).

The record does not support petitioner's contention of police brutality. The evidence of petitioner was vigorously and abundantly contradicted by the above State witnesses who testified that petioner was not subjected to any threats of force or actual violence, or that there was any physical condition causing any discomfiture to him.

(b)

Petitioner pleaded non vult to the indictment and use of the confession was thereby dispensed with; and the confession cannot now be subject to attack by means of habeas corpus.

As we have pointed out under subdivision (a) of this Point, it was established by the State at the hearing on the writ in the District Court by the greater weight of the evidence that petitioner's confession was given freely and voluntarily and that it was procured by means consistent with constitutional standards of "fundamental fairness."

If petitioner had gone to trial he could have attacked the legality of his confession and the State would have been required to establish its voluntariness as a prerequisite to its admissibility in accordance with State law and that it was procured by means consonant with due process.

However, petitioner chose not to go to trial and some 15 months after the taking of the confession he entered a plea of non vult to the indictment in open court in the presence of and upon the advice and with the consent of his counsel.

We respectfully submit that under these circumstances, in view of petitioner's plea of non vult, there was no longer any need for use of the confession and the trial judge acquired the necessary jurisdiction to impose an appropriate sentence.

We respectfully submit, too, that under such circumstances the petitioner could not thereafter make any proper and legitimate attack upon his confession by way of habeas corpus proceedings.

In the case of *In re Domako*, 20 N. J. Super. 314, 90 A. 2d 30 (N. J. App. Div. 1952), aff'd 11 N. J. 591, 95 A. 2d 505 (N. J. S. C. 1953), the defendant pleaded guilty to four indictments and was given a prison sentence. Thereafter he applied for habeas corpus, claiming, as one of his grounds, his unlawful detention for seven days following his arrest and before he was arraigned; that during the detention he was subjected to continued questioning and physical force which led to the giving of his confession. His contention was rejected because *"he pleaded guilty and if confessions were made by him, no use was ever made thereof,"* (p. 316 of 20 N. J. Super.), and that under such circumstances the defendant could not invoke the rule that in order to be admissible the confession must be shown to have been voluntarily given.

A Federal case in point is *Trowbridge* v. *Pennsylvania*, 112 F. Supp. 356 (D. C. 1952), aff'd 204 F. 2d 689 (3d Circ. 1953). There the defendant pleaded guilty to two counts of a 3-count indictment. On habeas corpus, he claimed that, (1) he had been severely beaten by the police and forced to sign a confession; and (2) he had been "tricked" by his attorney into offering a guilty plea. His contentions were rejected because he failed to sustain his claim of denial of constitutional rights in the habeas corpus proceedings in the State courts, and the record clearly supported the State courts' conclusion that there had been no denial of his constitutional rights. The Federal court particularly emphasized the point that because of his pleas his confession had not been used against him when it stated (p. 357 of 112 F. Supp.):

> "But even if petitioner had been beaten to extract the confession, he would not be entitled to the writ,

for *the confession was not used against him . . .*" (emphasis supplied).

The court considered of significance the period of time that elapsed from the time he gave his confession to the time he entered his pleas, as follows (p. of 112 F. Supp.):

> ". . . Also petitioner alleges that he was beaten on April 21, 1951. He was sentenced on June 25, 1951 which is over two months after the alleged beating. Thus any duress which might have been used, and we do not find this to be the fact, had ceased before petitioner was taken to court to sign the plea of guilty."

This is how the Court disposed of his contention of "trickery" of his counsel (See notation No. 3):

> "The plea was signed in the presence of petitioner's counsel which further negatives the averment of duress. The allegation that petitioner's counsel tricked him into signing a plea does not raise a federal question. Even if it were true, it would not stamp the sentence as a farce and mockery of justice." (Citing cases).

This was the situation in the instant case. Petitioner was taken into custody on the morning of December 18, 1949. His confession was taken in the afternoon and early evening of the same day. The following morning, December 19, 1949, at about 11:00 A. M., he was taken before the Magistrate for arraignment on the criminal complaint. At the arraignment he was represented by his counsel and a plea of not guilty entered. It was not until March 26, 1951, more than 15 months after the confession, after his counsel had unsuccesfully undertaken various appeals in the State

courts from the trial judge's denial of his request for a pre-trial inspection of his confession, that petitioner retracted his plea of not guilty and substituted a non vult plea to the indictment which was done in the presence of, and upon the advice and with the consent of his counsel.

We respectfully submit that under these circumstances, there was abundant time afforded to petitioner to reflect and understand the nature and consequences of his plea, and that he should not thereafter be permitted to attack the legality of his confession, which was never used against him, by means of habeas corpus proceedings.

U. S. ex rel. Brink v. *Claudy*, 96 F. Supp. 220 (D. C. Pa. 1951), aff'd 194 F. 2d 535, rehearing denied 102 F. Supp. 802, aff'd 200 F. 2d 699, cert. den. sub nomine *Brink* v. *Pennsylvania*, 345 U. S. 930, 73 S. Ct. 792 is a good case in point. There the defendant was arrested without warrant, placed in a cell and held incommunicado and brutally beaten for the purpose of obtaining his confession. It was held that issuance of a writ of habeas corpus was not justified "*where no confession had been received or offered in evidence.*" Cases of similar import are *U. S.* v. *Gallagher*, 183 F. 2d 342; *U. S.* v. *Payne*, 183 F. 2d 415, cert. den. 340 U. S. 913, 71 S. Ct. 283; *Holly* v. *Pennsylvania*, 81 F. Supp. 861, aff'd 174 F. 2d 480; *Waley* v. *Johnston*, 139 F. 2d 117, cert. den. 321 U. S. 779, 64 S. Ct. 617, rehear. den. 321 U. S. 804, 64 S. Ct. 845.

The facts and circumstances of *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116, 76 S. Ct. 223 (1956), upon which petitioner strongly relies (B. p. 8), are so strikingly at odds with those in the instant case that the case cannot serve as any advantage to petitioner. There the defendant

had never had the benefit of counsel at any stage of the proceedings; he was without counsel upon his arraignment, and he was without counsel when he entered his guilty pleas to 30 charges. Further, the prosecuting attorney subjected him to great pressure by demanding that petitioner "sign your name (to the pleas) and forget it." It is most significant, too, that all of petitioner's allegations contained in his petition were *undisputed* by the State.

That is not the situation here. If petitioner had gone to trial and there attempted to attack the legality of his confession the State would have been prepared to show that the confession was given freely and voluntarily and by means of fundamental fairness. But petitioner avoided a trial by pleading non vult and the confession was never used against him.

At no time did petitioner make any attempt to attack his confession in the State courts. It was not until he instituted habeas corpus proceedings in the Federal District Court that he made an attack upon his confession by claiming it had been extorted by the police. And at the hearing in the District Court the State vigorously disputed his claim by submitting abundant evidence of all of the police officers and prosecuting officials involved to show that the confession was freely and voluntarily given and that it was procured by fundamentally fair means.

In contrast with the *Herman* v. *Claudy* case, *supra*, the petitioner in the instant case had the benefit of counsel from the evening of December 18, 1949, immediately following the taking of his confession, throughout every step of the criminal proceedings until he was sentenced on April 18, 1951.

POINT TWO.

In conformity with New Jersey law that an accused is entitled to the aid and assistance of counsel for his defense at the trial, petitioner was not denied any constitutional right to counsel while he was being questioned during the police investigation of the crime, especially where petitioner was afforded counsel immediately upon completion of the police investigation and from thenceforth throughout every step of the criminal proceedings.

At the hearing in the District Court, petitioner testified in substance that on December 18, 1949, at about 8:00 A. M., in response to a police call, he voluntarily presented himself at Orange police headquarters; at about 10:00 A. M. he was taken into custody by Newark detectives and taken to Newark police headquarters where he was questioned in connection with the murder committed in Newark on March 17, 1947.

Corvino and DeMasi had already been taken into custody and they involved the petitioner as a participant in the crime.

It was testified to by Prosecutor's Detective Meagher, that at first the petitioner disclaimed any knowledge of the crime, but upon further questioning he gave the police a detailed oral admission of his participation in the murder, and he detailed the part played by each of the other two participants; and Detective Meagher further testified that later the same day he reduced petitioner's oral admissions of the details to a 7-page written confession which,

upon its completion, was read by and to petitioner and signed by him.

Petitioner stated that he was questioned intermittently; that he was taken back and forth from his cell to the interrogation room several times; and he claimed he was subjected to physical violence, stating that the alleged beatings were confined to the lower part of his body and not to the face and head; that the alleged beatings were not administered by or in the presence of Assistant-Prosecutor Maurice J. McKeown who had been present during the entire investigation and in attendance during the questioning of petitioner.

He further testified that he requested to see his lawyer, Mr. Frank A. Palmieri, but this request was refused. The said attorney did not personally testify at the hearing, but his affidavit which had been submitted to the original trial court upon petitioner's original petition for habeas corpus and which was by consent submitted to the District Court as part of the record, stated that the attorney arrived at Newark police headquarters at about 2:00 P. M. of December 18, 1949, and that about 4:30 P. M. and hourly thereafter the attorney requested of the police officer at the desk on the ground floor of Newark police headquarters, and of Assistant-Prosecutor McKeown, that he be permitted to see and consult with his client, that his requests were refused, and that he was finally permitted to see his client at about 9:30 P. M.

Prosecutor's detective Meagher testified that he arrived at police headquarters at about 12:35 P. M. but he did not commence the questioning of petitioner until "about 3:15 P. M." and the questioning continued "until

about 4:10" P. M. (T-73). During the questioning the petitioner orally admitted and gave all specific details concerning the crime and the participation of each of the men in its commission (T-75 to 79). Detective Meagher further testified that he commenced the writing of the 7-page confession "at 5:17 P. M.," that he concluded it "about 8:10 or thereabouts," and that the impartial citizen-witness (Mr. Taylor) arrived at headquarters at about 8:30 P. M. (T-80).

Assistant-Prosecutor McKeown, at the hearing, testified that he saw petitioner's attorney at police headquarters on the afternoon of December 18; he admitted that the attorney had requested to see his client; and that "I wasn't permitting him to see him until the investigation had been completed, and the investigation had not been completed." (T-96).

After the investigation was completed petitioner's attorney was allowed to see and consult with his client, which was about 9:00 P. M.

From that time on, petitioner was continually represented by his counsel throughout every step of the criminal proceedings, including the arraignment which was held the following morning, December 19, 1949, the entry of petitioner's plea of non vult on March 26, 1951, and the imposition of the sentence on April 18, 1951.

At the time of the arraignment, petitioner was advised of his rights by Magistrate, in conformity with the New Jersey Rules of Practice and Procedure, and a plea of not guilty was entered for him.

At the time of the plea of non vult, petitioner's attorney addressed the court in his behalf, and in reply to the

Assistant-Prosecutor's and the court's inquiry, petitioner gave assurance that he was entering his plea of non vult voluntarily and understandingly.

And again at the time of sentence, petitioner, in the presence of his counsel, was asked if he had any statement to make.

At no time on either of these occasions did petitioner utter a word of complaint either with respect to the manner of the taking of his confession, or that he had been refused permission to see and consult with counsel during the police investigation.

It is the established law of New Jersey that an accused's constitutional right to counsel contemplates the aid and assistance of counsel *for his defense at the trial*, and not during the period between his arrest and arraignment. (*State* v. *Grillo*, 11 N. J. 173, S. C. 1952, cert. den. sub nomine *Grillo* v. *State of New Jersey*, 345 U. S. 976, 73 S. Ct. 1123, 1953; *State* v. *Murphy*, 87 N. J. L. 515, 528-531, N. J. E & A. 1915; *State* v. *Bunk*, 4 N. J. 461, 470, N. J. E. & A. 1952, cert. den. 340 U. S. 839, 71 S. Ct. 25; *State* v. *Cole*, 136 N. J. L. 606, N. J. E. & A. 1949, cert. den. 334 U. S. 851, 68 S. Ct. 1503).

The New Jersey Supreme Court, in *State* v. *Grillo*, *supra*, said, p. 180:

> "With respect to the allegations of denial of permission to consult counsel during the police interrogation, the former Court of Error and Appeals has expressly determined this alleged constitutional question, denial of counsel during the period between arrest and arraignment and its effect on a confession obtained during that period, adversely to

the contentions here presented by the defendants, in *State* v. *Murphy*, 87 N. J. L. 515, 528-531 (E. & A. 1915). In *State* v. *Murphy*, supra, the court said:

"'The constitutional provision, whose protection is invoked, contemplates a criminal prosecution and provides for a speedy trial and public trial by an impartial jury, that the accused shall be informed of the nature and cause of the accusation, be confronted with the witnesses against him, have compulsory process for obtaining witnesses in his favor, and (conjunctively) have the assistance of counsel for his defense. It clearly appears that the rights thus intended to be secured to a criminal defendant are rights arising from a criminal prosecution—that is, a trial upon indictment. A prisoner making a confession is not confronted with any witnesses, at least never in the sense that they are examined in his presence, he can have no process for witnesses in his favor upon such an occasion, and, consequently, he is not entitled to the assistance of counsel to save him from himself. That is done later by the trial court if the confession were unlawfully obtained.'

"It was held in *State* v. *Bunk*, 4 N. J. 461,.470 (1950), certiorari denied 340 U. S. 839, 71 S. Ct. 25, 95 L. Ed. 615 (1950) that:

"'. . . the law over the years in this State has been that a person is only entitled to counsel to aid him in his defense, not to save him from his own voluntary acts, *State* v. *Murphy*, 87 N. J. L. 515 (E. & A. 1915); *State* v. *Cole*, 136 N. J. L. 606, supra. . . .'"

We cannot agree with petitioner's contention under this point that he had a "fundamental right" to the "advice and assistance of counsel" at the time of the police interrogation, and that the Court below erred in its holding that

the lack of counsel at such time did not invalidate the confession.

Careful examination of the above-cited New Jersey cases (*State* v. *Grillo*, *State* v. *Murphy*, *State* v. *Bunk*, and *State* v. *Cole*, *supra*) will disclose that New Jersey's highest court determined what was meant by the right to counsel under both the State and Federal Constitutions, and that the right to the aid and assistance of counsel under the Federal Constitution did not contemplate the right to counsel while a defendant is under arrest and at the time he gives a confession. This is what is stated in *State* v. *Murphy*, *supra*, p. 530:

> "It is to be observed that the constitution (referring to the Amendment VI of the Federal Constitution providing that, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.") does not provide that the defendant shall have the right to have assistance of counsel from the time of his arrest, but for his defence. Obviously, the word *defence*, as here used, means that a defendant is entitled to be represented and defended by counsel when put in jeopardy on his trial, and that his counsel shall have reasonable access to the prisoner for the purpose of preparing his defence. . . . By no stretch of the imagination can the provision be construed to mean that one accused of crime shall have the benefit of counsel to advise him as to whether or not he shall confess. *Confession* is a thing entirely apart from *defence* upon a trial. This is evidenced every day by the pleas of guilty made by criminal defendants without the assistance of counsel to advise them thereon. A plea of guilty amounts to a confession in open court."

The case of *Fikes* v. *State of Alabama*, 77 S. Ct. 281 (1957), (a portion of the dissenting opinion being quoted by petitioner, B. pp. 11-12), certainly does not support petitioner's contention under this Point that a refusal to permit a prisoner's attorney to see and consult with him while the prisoner is being investigated and questioned by the police between the time of his arrest and arraignment constitutes a denial of due process. There the defendant's conviction (burglary with intent to rape and the death sentence imposed) resulted largely from the evidence at his trial of his alleged confessions, and it was held that "the totality of the circumstances that preceded the confessions"(3), established by the State's witnesses, rendered the confessions involuntary and their use at the trial constituted a denial of due process.

The lawyer who called to see petitioner came one week after the arrest, 6 days after the questioning began, 2 days *after* petitioner gave his first confession, and 3 days *before* the second confession. Besides, there is no indication from a reading of the dissenting opinion that even if the attorney had had previous authority from petitioner or his family that it would have had any bearing upon the dissenting justices' opinion.

Contrast the facts and circumstances of the *Fikes* case with those in the instant case.

Here the petitioner was taken into custody on the morning of December 18, 1949 at about 8:00 A. M., and about

(3) Lack of education and low mentality of defendant; his arrest by civilians, lodgment in jail and subsequent removal to a state prison far from his home; questioning before the first confession for several hours' at a time over a period of five days; kept in isolation for a whole week except for intermittent sessions for questioning; failure of arraignment in violation of State law; lengthy questioning before the second confession.

two hours later he was turned over to the Newark police who took him to Newark headquarters where petitioner's two confederates were already in custody and under questioning; Prosecutor's Detective Meagher who had been assigned to interview the petitioner arrived at headquarters shortly after noon, and he did not commence questioning the petitioner until about 3:15 P. M.; his oral questioning lasted about one hour, until about 4:10 P. M., and during this questioning petitioner admitted his participation in the crime and also that of his two confederates; Detective Meagher then proceeded to take the written confession which began at about 4:10 P. M. and completed shortly after 8:00 P. M. After the impartial citizen witness (Taylor) interviewed the petitioner who acknowledged to him that he had not been mistreated by the police, at about 9:00 P. M., petitioner's attorney was permitted to see and consult with him.

It is significant that any accusation of alleged violence or threats, which petitioner made for the first time at the hearing on habeas corpus before the District Court but which he had never complained of theretofore in any proceeding in the State courts, was specifically and vigorously denied by all of the State witnesses at the hearing (testimony of Prosecutor's Detective Meagher, Detectives Kinney and Norris of Newark police headquarters, and of Assistant Prosecutor McKeown).

It is of significance, also, that petitioner's confession which he attacked in the Federal Court hearing, had never been used against petitioner since he entered a plea of non vult; and there never was any trial in which the State would have been prepared to show its voluntariness.

As to petitioner's complaint that his attorney was not permitted to see him while he was under investigation and questioning in Newark headquarters, the attorney was permitted to see him immediately after the completion of the police investigation; the same attorney represented him the following morning at the arraignment before the Magistrate; and the same attorney continued to represent him thereafter throughout every step of the proceedings down to the entry of plea of non vult on March 26, 1951 and the imposition of sentence on April 18, 1951.

Petitioner, in his Brief (pp. 10-11), cites and quotes from cases on the subject of an accused's right to counsel, with which we have no quarrel except that they have no application here.

For example, in *Williams* v. *Kaiser*, 323 U. S. 471, 65 S. Ct. 368 (B. pp. 10, 11, 16-17), the court failed to comply with defendant's request for assignment of counsel to defend him *at the trial*, and rather than go to trial without adequate legal representation the defendant entered a plea of guilty. This was held to be a denial of due process because, as the Court pointed out, while a conviction based upon a guilty plea should not be lightly impeached, such a plea to a capital offense must be given serious consideration where the defendant *asked* for counsel and could not obtain one, especially when he was incapable adequately of making his own defense.

Likewise, in *Uveges* v. *Pennsylvania*, 335 U. S. 437, 69 S. Ct. 184 (B. p. 11), where a 17-year old defendant under four charges of burglary was never informed of his right to counsel and he was never offered counsel at any time in the entire proceedings. He succumbed to the prosecuting

attorney's direction to plead guilty upon the understanding that he would receive a Reformatory sentence but instead he was sentenced to 20 to 40 years in the Penitentiary. This was unquestionably a denial of due process.

Hawk v. *Olson*, 326 U. S. 271, 66 S. Ct. 116 (B. p. 11), was another case of denial of due process which cannot be compared with the instant case. There the defendant was taken from Kansas to Nebraska, held incommunicado in jail where he was visited for 15 minutes by the Public Defender and his assistant who tried to intimidate him into pleading guilty, after which they left the defendant saying they would have nothing to do with his trial; the following morning defendant was arraigned on a charge of murder and he pleaded guilty without any counsel; defendant requested a 24-hour adjournment of trial in order to consult with counsel and prepare his defense which was refused; his trial commenced without counsel and after two or three jurors were impaneled the Public Defender and his assistant stepped forward and entered the case; they never consulted with defendant before trial, and the court never assigned any counsel to represent the defendant; and after the jury was selected there was a recess of the trial until the following morning.

In *White* v. *Ragen*, 324 U. S. 760, 65 S. Ct. 978 (B. p. 11), the court-appointed counsel failed to confer with defendant until the case was called for trial when counsel told defendant he would do nothing for him unless he had some money; when defendant asked counsel to call a certain witness in his behalf, counsel said he "did not have the time" as he had a case in another court; counsel demanded that defendant plead guilty as the court would not grant a con-

tinuance; and when defendant requested a continuance the judge told him to "keep still ' as the attorney would do all the talking for him; and finally the defendant in despair entered a plea of guilty. This was held to be a denial of due process because of a lack of "effective counsel."

In *Powell* v. *Alabama,* 287 U. S. 45, 53 S. Ct. 55 (B. p. 11); defendants were arraigned immediately upon return of the indictment and they pleaded not guilty. In response to their request for counsel, the judge appointed "all the members of the bar" thereby anticipating that some members of the bar would come forward to aid the defendants, but none did so; and defendants were not given any reasonable opportunity to communicate with their families and endeavor through them to obtain counsel. It was held that the attempted designation of counsel was so indefinite and so close upon trial as to amount to a denial of "effective" and substantial aid and assistance of counsel within the meaning of due process.

Canizio v. *New York,* 327 U. S. 82, 66 S. Ct. 452, cited and quoted from (B. p. 13), would seem to support respondent's contention. There a 19-year old defendant pleaded guilty to robbery, and he claimed that at the time of plea he was not represented by counsel and was not advised of his right thereto. The State showed that an attorney had filed a "notice of appearance" in defendant's behalf two days before the sentence. It was held that, "even though petitioner may not have had counsel at the beginning, he had counsel in ample time to take advantage of every defense which would have been available to him originally;" that petitioner "actually had the benefit of counsel;" and when counsel took over the deefnse "he could have raised

the question of a defect in the earlier part of the proceedings," (p. 453, bottom, to p. 454 of 66 S. Ct.)

In *Stroble* v. *California,* 343 U. S. 154, 72 S. Ct. 599 (1952), quoted from by petitioner (B. p. 13), the defendant was being examined in the district attorney's office in connection with the murder for almost an hour when an attorney who said he had been sent by defendant's son-in-law made a request to inquire of defendant personally as to his guilt of the crime and report it back to the son-in-law; and the attorney's request was refused. It was held that the refusal did not constitute a deprivation of due process "*either independently or in conjunction with all other circumstances in the case,*" such as, that defendant's examination was made in the presence of some nineteen persons connected with the district attorney's office and police department; that the district attorney inspired certain inflammatory newspaper reports prior to the trial; that defendant was without counsel at a sanity hearing; and an unwarranted delay in defendant's arraignment.

The facts and circumstances in *U. S. ex rel. Caminito* v. *Murphy,* 222 F. 2d 698 (2d Circ. 1955), cert. den. 350 U. S. 896, are vastly different from those in the instant case. There the defendant was arrested on Sunday, May 11, 1941, at 6:00 P. M. and five or six officers questioned him from 9:00 P. M. until 2:00 A. M. the following morning, a period of 5 hours; he was then placed in a cell; given no bed, spring or mattress, and blankets, but only a wooden bench; his questioning was resumed at 10:00 A. M. the next morning and continued all day; members of his family, a friend, and an attorney who called at the station house "tried to get information concerning his whereabouts," but they were

given no information and defendant was kept incommunicado; no one was permitted to see him until his arraignment which took place 40 hours after his arrest; two women and a man, who were detectives in disguise, saw the defendant on May 12th ostensibly to identify him as the person they had seen at the wheel of the get-away car at the time of the stickup and shooting, whereas they were not witnesses at all and defendant was not told that they were detectives; defendant signed confessions at about 9:00 P. M. of May 12th (27 hours after his arrest); and he was not arraigned until late the following day, May 13th. Furthermore, *the above facts were not disputed by the State;* and there was ample opportunity to arraign the defendant much sooner because under New York law a City Court was required to be open "every day" including Sundays and a Magistrate is always available. Under the facts and circumstances of that case there was clearly a denial of due process, which was not the situation in the instant case.

Here it cannot be said that the interrogation was unduly "protracted" or unreasonably "prolonged." On Sunday morning, December 18, 1949, at about 10:00 A. M., defendant was taken from Orange to Newark police headquarters (a distance of 4 or 5 miles) and placed in a cell. Prosecutor's Detective Meagher arrived at about 12:45 P. M. and he began the questioning of petitioner at "about 3:15 P. M.," (T. p. 73) and continued "until about 4:10" (about 1 hour); Detective Meagher commenced the writing of the confession "at 5:17 P. M.," and he completed it at "about 8:10 or thereabouts;" the impartial citizen witness (Taylor) "arrived in the neighborhood of 8:30," and after he questioned petitioner about police treatment and peti-

tioner acknowledged he had been well treated, his attorney was permitted to see and consult with him.

The entire police investigation, including petitioner's questioning and the taking of his written confession, did not exceed a period of five to six hours.

Petitioner's attorney, who was not permitted to see the defendant in the afternoon while defendant was under questioning and investigation, was permitted to see and consult with his client in the neighborhood of 9:00 P. M., and from that moment on the attorney was available to him continually and at every step of the criminal proceedings until the close of the case.

The attorney was present when petitioner was arraigned the following morning at about 11:00 A. M. in the Magistrate's Court and he was advised of his rights pursuant to the requirements of the New Jersey Rules of Practice and Procedure; he was present in court on the day fixed for trial, March 26, 1951 when petitioner retracted his plea of not guilty and entered a plea of non vult, at which time petitioner acknowledged that he was entering his plea voluntarily and understandingly; and he was present in court on April 18, 1951 at the time of sentencing when the attorney made a plea for leniency.

During the time intervening between the arraignment on December 19, 1949 and the entry of the plea of non vult on March 26, 1951 (about 15 months), petitioner's counsel resorted to motions for the suppression and pre-trial inspection of petitioner's confession and the attendant appeals in the New Jersey courts to no avail.

The gist of petitioner's contention under this point seems to be, briefly, that, "upon occasion the innocent as

well as the guilty succumb to such tactics (police questioning of an accused soon after his arrest) and plead guilty to crimes they did not commit," (B. p. 17), and that, "For this reason alone assistance of counsel during police interrogation taking place after arrest and prior to arraignment is a fundamental right," (B. p. 18), with which we do not agree.

Under New Jersey law, as we have hereinbefore pointed out, the constitutional provision on assistance of counsel "contemplates a criminal prosecution" in which the defendant is entitled to have "the assistance of counsel *for his defense*," (*State* v. *Murphy, supra*); and that "the law over the years in this State has been that a person is only entitled to counsel to aid him in his defense, not to save him from his own voluntary acts," (*State* v. *Bunk, supra*)

We think that the following statement of Chief Justice Vanderbilt in *State* v. *Tune*, 13 N. J. 203, 216 (1953) is a complete answer to any argument against the questioning of an accused by the police soon after arrest:

> "The confession obtained shortly after apprehension is more apt to be trustworthy since it is a spontaneous statement before the accused has had an opportunity to converse with the older habitues of the jail and others who may aid him in preparing a falsified defense, and encourage him to give perjurious testimony. Thus Dean Wigmore, in upholding the legality of continuous questioning by police states:
>
> " 'In the first place, an innocent person is always helped by an early opportunity to tell his whole story; hundreds of suspected persons every day are set free because their story thus told bears the marks

of truth. Moreover, and more important, every guilty person is almost always ready and desirous to confess, as soon as he is detected and arrested. This psychological truth, well known to all criminal trial judges, seems to be ignored by some Supreme Courts. The nervous pressure of guilt is enormous; the load of the deed done is heavy; the fear of detection fills the consciousness; and when detection comes, the pressure is relieved; and the deep sense of relief makes confession a satisfaction. At that moment, he will tell all, and tell it truly. To forbid soliciting him, to seek to prevent this relief, is to fly in the face of human nature. It is natural, and should be lawful, to take his confession at that moment—the best one. And this expedient, if sanctioned, saves the State a delay and expense in convicting him after he has reacted from his first sensations, has yielded to his friends' instinct to struggle to save himself by the aid of all technicalities.' "

POINT THREE.

The refusal of the State courts to allow to petitioner a pre-trial inspection of his confession was in accordance with State law, and such refusal did not contribute to any alleged "unfairness" in the proceedings.

Petitioner was taken into custody on the morning of December 18, 1949, and he gave his written confession in the late afternoon and evening of the same date.

On March 3, 1950, before trial of the indictment, petitioner's attorney made application to the County Court for an inspection of petitioner's confession as well as of those

of the other two co-defendants allegedly because his confession had been obtained while he was under arrest without complaint or warrant, without having been advised of his constitutional rights, and that he had been denied counsel while he was under questioning by the police before his arraignment. The County Court denied the application in its entirety, and on appeal to the Superior Court, Appellate Division, the latter court rejected petitioner's contention that he had an absolute right to inspection, without charging any abuse of discretion, and dismissed the appeal. (*State* v. *Cicenia*, 9 N. J. Super. 135.)

On appeal to the New Jersey Supreme Court, it was held that an accused does not have the absolute right to a pre-trial inspection of his confession but such an application is addressed to the sound judicial discretion of the trial court to be exercised only as the interest of justice may require and with the thought in mind that the admissibility of the confession is always a matter for determination at the trial; that an accused has no right to have his confession suppressed before trial; and that he has no right to an inspection of the confessions of his co-defendants. (*State* v. *Cicenia*, 6 N. J. 296.)

We respectfully submit that in refusing to allow to petitioner's attorney a pre-trial inspection of the confession, the courts of New Jersey adopted a rule which is consistent with that of many other jurisdictions. (*State* v. *Haas*, 188 Md. 63, 51 A. 2d 647, Ct. App. 1947; *People* v. *Skoyec*, 50 N. Y. S. 2d 438, Sup. Ct. 1944; *State* v. *Leland*, 190 Ore. 598, 227 P. 2d 785, Sup. Ct. 1951, aff'd 343 U. S. 790, 72 S. Ct. 1002).

What the New Jersey Supreme Court stated on the subject in *State* v. *Tune*, 13 N. J. 203, 218 (1953), can well be repeated here:

> "We can well understand the desire of defense counsel to see the confession in every case particularly where the defendant after having made the confession finds on reflection it is better for himself to forget it. But the wishes and convenience of defense counsel are not the test * * *"

Petitioner, on page 20 of his brief, cites *State* v. *Dorsey*, 207 La. 928, 22 So. 2d 273 in support of the rule that the refusal to furnish the defense with a copy of defendant's confession is *per se* a violation of due process. A reading of that case will disclose that the conclusion was grounded upon a particular set of facts existing in that case. Furthermore, it seems that Louisiana is the only state in the nation where the right to inspection is claimed to exist, and it is recognized that the case expresses a view entirely inconsistent with the law of most of the states. The rule in *State* v. *Dorsey* was rejected in *State* v. *LeLand*, 190 Ore. 598, 228 P. 2d 785, *supra*. (See 20 Tulane L. R. 133, 135 (1945).)

In his brief, page 21, petitioner quotes an excerpt from the opinion in the *Tune* case (*In the Matter of John Henry Tune*, 230 F. 2d 883, cert. den. 351 U. S. 987, 76 S. Ct. 1057), to the effect that failure to give the defense a copy of the confession will constitute a violation of due process "only if prejudice can be shown."

We submit that in the instant case, other than the mere statement that, the refusal to afford to the petitioner a pretrial inspection of his confession, when considered together with the questioning by the police without counsel, resulted

in prejudice, there is nothing in the case to indicate that petitioner actually had been prejudiced in maintaining his defense on the merits, had he seen fit to go to trial.

VI.

Conclusion.

For the reasons hereinbefore set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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